THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES AFTER *HOLLAND*

TABLE OF CONTENTS

INTRODUCTION 58
I. THE CONSTITUTIONAL HISTORY OF JURY CHALLENGES .. 62
A. *The Venire Caselaw* 64
1. The Equal Protection Clause 64
2. The Sixth Amendment 66
B. *The Peremptory Challenge Caselaw* 68
1. The Equal Protection Clause 69
2. The Sixth Amendment 73
a. *State and Lower Federal Court Decisions* 73
b. *Holland v. Illinois* 77
II. LIMITATIONS ON THE DEFENSE COUNSEL AFTER *HOLLAND* 82
A. *The Public Function Theory* 84
B. *Relationship Between Private Action and the State* 85
CONCLUSION 89

INTRODUCTION

Many trial attorneys subscribe to the philosophy that the outcome of their case has been determined as soon as the jury has been selected.[1] These lawyers will go to great lengths to mastermind and engage in calculated methods for choosing the "perfect" jurors. They employ various techniques to pinpoint the types of persons who will most likely favor their client's interest.[2] Because attorneys know little about the group of prospec-

---

[1] J. VAN DYKE, JURY SELECTION PROCEDURES (OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANEL) 139 (1977) [hereinafter VAN DYKE]; *see also* D. VINSON, JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY xv (1986) (juror attitudes, opinions, beliefs, values, prejudices, and biases "are the framework jurors use to interpret the facts of a case."); Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 576 (1985) ("Jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case"). *But see* Pavalon, *Jury Selection Theories: Art? Science? Guessing Game?*, TRIAL, 26 (June 1987) ("The art of famous trial lawyers is often more in their colorful and lively presentations and postures after voir dire than in their initial assessments of the most sympathetic jurors").

[2] *See* Covington, *supra* note 1, at 585-89. In order to make intelligent choices during jury selection, attorneys should attempt to become as informed as possible about the veniremen in the voir dire. *Id.* at 585-86. The establishment of a good

tive jurors from which they must choose, they are inclined to draw general conclusions about the ideological postures of the veniremen and, more pertinently, the jurors' potential sympathies to their client. Consequently, inherent in the jury selection process[3] is superficial stereotyping designed to secure the best attainable jury. While obtaining jurors who are most sympathetic to the client is a valid goal, its implementation throughout the jury selection process often results in gross discrimination. Many societal groups have experienced this discrimination, but its most widespread impact has been on racial groups, particularly in criminal proceedings. Excluding potential jurors from service on the jury panel based solely on race has been held to infringe

---

rapport with each prospective juror will facilitate this by relaxing the jurors so that they feel comfortable with sharing useful and personal information. *Id.* at 586-87. An attorney can best accomplish this by asking questions in a non-interrogating, non-imposing manner. *Id.*

Dr. Covington presents a list of conclusions from psychological research that attorneys have been advised to consider during the voir dire questioning:

> [Studies have concluded that] a conviction-prone juror believes:
>
> (a) society is too permissive toward sex,
> (b) misfortunes are the result of laziness,
> (c) alcoholics are moral degenerates,
> (d) jurors often acquit out of pure sympathy,
> (e) courts protect criminals too much, and
> (f) the death penalty should be used in some circumstances.
>
> Similar studies reveal that an acquittal is more likely to be received from a juror who:
>
> (a) is married to a liberal or to a less-educated spouse,
> (b) would rather read than watch T.V.,
> (c) has several children,
> (d) has older siblings,
> (e) has returned a 'not guilty' verdict before,
> (f) does not believe criminals are too protected by the courts,
> (g) does not agree that jurors are too sympathetic toward criminals,
> (h) does not like the victim,
> (i) has had prior difficulties with the law, and
> (j) does not believe the prosecutor is competent and well prepared.

Id. at 589 (citing Sannito & Arnolds, *Jury Study Results: The Factors at Work*, TRIAL DIPL. J. 6, 10, 11 (Spring 1982)).

In addition to guidelines for questioning the prospective jurors, other techniques have also been recommended as useful for selecting the most sympathetic jurors. These include body language studies, *see* Peskin, *Non-Verbal Communication in the Courtroom*, TRIAL DIPL. J. 6 (Summer 1980), community attitudinal surveys, *see* Covington, *State-Of-The-Art In Jury Selection Techniques: More Science than Luck*, TRIAL 84 (Sept. 1983), and mock trials, *see* Covington, *supra* note 1, at 596. Another interesting technique is the use of shadow or "mirror" juries, where, in addition to the real jury, six to twelve people are selected to give attorneys feedback on a daily basis throughout the trial. *Id.* at 598.

[3] *See infra* notes 14-20 and accompanying text.

upon the constitutional rights of not only the criminal defendant, but also the excluded juror.[4]

To eliminate discrimination in the jury selection process, courts have relied on the equal protection clause of the fourteenth amendment and the sixth amendment guarantee of a right to an impartial jury.[5] The Supreme Court has applied both doctrines to eliminate discrimination at the venire level.[6] In a 1986 landmark decision, the Court in *Batson v. Kentucky*,[7] held that the equal protection argument further applied to the use of peremptory challenges[8] in the petit jury selection. Recently, however, the Court refused to similarly extend the sixth amendment to proscribe discrimination during the selection of the petit jury in

---

[4] Batson v. Kentucky, 476 U.S. 79 (1986). In *Batson*, the Court held that "the defendant does have a right to be tried by a jury whose members [have been] selected pursuant to nondiscriminatory criteria." *Id.* at 85-86 (citing Martin v. Texas, 200 U.S. 316, 321 (1906); Ex parte Virginia, 100 U.S. 339, 345 (1880)). The Court posited that "[r]acial discrimination in [the] selection of jurors harms not only the accused . . ." but also the excluded juror. *Id.* at 87. The Court asserted that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror." *Id.* (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

[5] U.S. CONST. amends. VI & XIV, § 1. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI. The fourteenth amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[6] *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("[j]ury wheels, pools of names, panels, or venires from which juries are drawn . . . that systematically exclude distinctive groups in the community" are unconstitutional under the sixth amendment impartial jury guarantee); Strauder v. West Virginia, 100 U.S. 303 (1880) (facially discriminatory jury selection statutes violative of equal protection clause). For a discussion of the venire stage of jury selection, see *infra* notes 24-49 and accompanying text.

[7] 476 U.S. 79 (1986).

[8] A peremptory challenge is defined as "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). In contrast, a challenge for cause is "[a] request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." *Id.* at 230. Peremptory challenges are normally employed when the attorney suspects a prospective juror of harboring bias toward the client, but is unable to offer a concrete explanation for this belief. *Id.* It is commonly noted that, when questioned about their biases, jurors will either not admit to or will not be aware of their prejudices. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 845 (1985) [hereinafter LAFAVE]. Thus, the peremptory challenge has been a valued tool of both prosecutors and defense attorneys for choosing a jury. *Id.*

the controversial *Holland v. Illinois* case.[9]

The *Holland* decision undercuts many lower court decisions which applied the sixth amendment protection to petit jury selection.[10] Courts and commentators who preferred the sixth amendment analysis to combat discrimination would have extended it to petit juries because it is broader in application than an equal protection analysis and, therefore, offers greater protection against discrimination in jury selection.[11] Additionally, the sixth amendment clearly would have applied to limit discriminatory peremptory challenges by the defense, but the equal protection clause restrains defense attorneys only upon demonstration that they are state actors. The Supreme Court's decision in *Holland* dismissed aspirations of using the sixth amendment by holding that an attack on the discriminatory use of peremptory challenges cannot be grounded in this constitutional provision.[12] The legal community must therefore resort to the equal protection clause despite its significant limitations in jury discrimination cases.[13]

In the wake of Holland, this comment explores the prospective expansion of the equal protection clause to eradicate discrimination in the use of peremptory challenges by defense attorneys. Part I traces the history of both the equal protection

---

9 110 S. Ct. 803 (1990).

10 For examples of state decisions interpreting the sixth amendment analogue in their respective constitutions, *see* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978); Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979), *cert. denied*, 444 U.S. 881 (1979); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986). Cases relying on the federal sixth amendment include Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *cert. denied* 479 U.S. 1046 (1987) (the sixth amendment to the United States Constitution prohibits race-based peremptory challenges by the prosecution); *accord* McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984). *But see* United States v. Clark, 737 F.2d 679 (7th Cir. 1984); United States v. Thompson, 730 F.2d 82 (8th Cir. 1984), *cert. denied*, 469 U.S. 1024 (1984); United States v. Childress, 715 F.2d 1313 (8th Cir. 1983), *cert. denied*, 464 U.S. 1063 (1984); People v. Payne, 106 Ill. App.3d 1034, 436 N.E.2d 1046 (Ill. App. Ct. 1982).

11 *See* Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081 (1982); Massaro, *Peremptories or Peers? - Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501 (1986); Comment, *Skin Color Doesn't Reason: Closing the Door on the Discriminatory Use of Peremptory Challenges*, 64 U. DET. L. REV. 171 (1986) [hereinafter Comment, *Skin Color*]. *Contra* Comment, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1357-58 (1985) [hereinafter Comment, *Rethinking*] ("sixth amendment limitation on the peremptory challenge is flawed").

12 *See Holland*, 110 S. Ct. at 806.

13 *See infra* notes 55-81 and accompanying text.

and sixth amendment analyses with respect to discrimination in jury selection. Part II considers whether the equal protection clause can be extended to afford greater protection against discriminatory jury selection practices, specifically addressing whether defense attorneys are state actors so that the equal protection clause will apply to restrain their use of peremptory challenges. This comment concludes that the defense's peremptory challenges should not be subject to equal protection limitations because there is no state action in this activity.

I. THE CONSTITUTIONAL HISTORY OF JURY CHALLENGES

There are primarily two jury selection procedures where unlawful discrimination occurs: (1) the assembly of the "master jury wheel" and the venire, and (2) the final selection of the petit jury.[14] Jury selection begins with the compilation of a master jury wheel, which is an inventory of the names of prospective jurors drawn from sources such as voter registration lists or lists of actual voters.[15] Individuals may be removed from the master jury wheel by the jury commissioner or the court clerk upon a finding of a valid excuse, exemption status or a lack of qualification.[16]

---

[14] *See* Magid, *supra* note 11, at 1084. *Cf.* VAN DYKE, *supra* note 1, at 24 (each stage of jury selection "can introduce or increase disproportions among identifiable groups").

[15] LAFAVE, *supra* note 8, at 833-34.

In federal courts, the jury selection process is controlled by the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69 (1970). LAFAVE, *supra* note 8, at 833. Under the Act, jurors are to be drawn from either voter registration lists or lists of actual voters. 28 U.S.C. § 1863 (b)(2) (1970). Individual states have their own statutes that govern jury selection in their state courts, but many states have adopted procedures similar to those of the federal courts. LAFAVE, *supra* note 8, at 834. Some alternate sources to which states may refer in compiling jury lists include drivers' license lists, telephone books, city directories, tax rolls, and local censuses. *Id.* at 834-35.

[16] A valid *excuse* is a showing that jury service would impose "undue hardship or extreme inconvenience" on an individual. LAFAVE, *supra* note 8, at 834; 28 U.S.C. § 1863 (b)(5) (1970). Common excuses include: "poor health, advanced age, a need to care for small children, or the distance [an individual] live[s] from the courthouse." LAFAVE, *supra* note 8, at 835. Groups that are typically *exempt* from jury service because it is in the best interest of the public to grant exemptions include: active armed forces members, policemen, firemen, or any public official in the legislative, executive, or judicial branch of government. *Id.* at 834; 28 U.S.C. § 1863 (b)(6) (1970). Some states also allow exemption status for doctors, teachers, clergy and pharmacists. LAFAVE, *supra* note 8, at 835. To be *qualified* for jury service, a person must: (a) have United States citizenship, (b) be at least 18 years of age, (c) have resided in the judicial district for at least one year, (d) be able to read, write, speak, and understand the English language, (e) be free of any mental or physical infirmity, and (f) have no prior convictions or charges pending against him

The names of persons remaining after such removals are placed on the "qualified jury wheel."[17] The venire is then formed by drawing names from the wheel as needed for jury service.[18] After the venire has been assembled, the attorneys for both sides conduct the "voir dire"[19] examination, during which they remove any jurors they suspect of harboring bias against their client through the exercise of challenges for cause and peremptory challenges.[20]

These procedures vary among state courts, but all United States courts must conduct the entire jury selection process in a constitutional, nondiscriminatory manner.[21] The precise limitations which the Constitution prohibits or allows has been the origin of much controversy. It is undisputed that both the equal

---

for a crime punishable by incarceration for one year or more. *Id.* at 834; 28 U.S.C. § 1865 (1970).

17 LAFAVE, *supra* note 8, at 834; 28 U.S.C. § 1866.

18 LAFAVE, *supra* note 8, at 834; 28 U.S.C. § 1866.

19 "Voir dire" translates literally into "to speak the truth." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

20 *See supra* note 8. State and federal statutes provide two procedures for exercising challenges during the voir dire. *See* LAFAVE, *supra* note 8, at 847-48. The more prevalent method is for the attorneys to question initially twelve veniremen, exercising challenges, peremptory and for cause. LAFAVE, *supra* note 8, at 847. The jurors that have been removed are replaced and the attorneys continue, alternately, until all of their challenges are exhausted or both sides are satisfied with the jury. *Id.* at 848. The second and less popular method is termed the "struck jury system," under which the attorneys question the veniremen and first exhaust their challenges for cause. *Id.* The excused jurors are replaced until the size of the panel is twelve plus the total number of peremptory challenges allowed for both sides. *Id.* Then, the attorneys exercise their peremptories in an order that will result in their finishing at the same time. *Id.* This process allows attorneys to make more informed decisions when exercising peremptory challenges because they have the opportunity to question all the jurors in the challenge for cause round before beginning the peremptory strikes. *Id.*

21 28 U.S.C. §§ 1861-62 (1970). The Federal Jury Selection and Service Act of 1968 provides in relevant part that "[g]rand and petit juries [must be] selected at random from a fair cross section of the community. . .", 28 U.S.C. § 1861 (1970), and that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. § 1862 (1970).

This antidiscrimination mandate applies, however, only to criminal proceedings in federal courts. *See id.* State courts are not bound by this explicit congressional ruling, but only by the Constitution. *See id.* While many state courts have adopted requirements for random and nondiscriminatory selection methods, others have refused to monitor the system to assure evenhandedness. VAN DYKE, *supra* note 1, at 86. Some states have surprisingly persisted with a "key-man" system of selection. *Id.* This system calls upon the "prominent, well-established civic or political leaders" of the community to submit recommendations for possible jurors. *Id.* (citation omitted). Such a jury assemblage can hardly be expected to fairly represent the community as a whole.

protection clause and the sixth amendment are applicable to challenge the discrimination during the venire assembly.[22] There has been considerable disparity among courts regarding the applicability of these constitutional guarantees to the final petit jury selection procedure.[23]

A. The Venire Caselaw

Discrimination occurs at the initial stages of jury selection when certain groups are either underrepresented or excluded from the master jury wheel, the venire or both. Historically, juries have been employed to render verdicts that "reflect the collective conscience of the community."[24] Our justice system rests on the presumption that twelve ordinary people will provide the best vehicle for obtaining objective and fair decisions that simulate the overall views of the community.[25] To further this objective, individuals from assorted community groups should be included in the jury selection process. If the venire does not include such a broad base of people, the jury can *never* truly represent the pervasive "conscience of the community."

1. The Equal Protection Clause

Using an equal protection analysis, the Supreme Court first addressed the problem of racial discrimination at the venire level in *Strauder v. West Virginia*.[26] Strauder, a black criminal defendant, brought suit challenging West Virginia's jury selection statute, which provided that only white males were eligible to serve as jurors in the state.[27] Strauder alleged that the statute's application denied him the equal protection of the law because members of his race were intentionally excluded from the jury that convicted him.[28] In an opinion authored by Justice Strong, the Court

---

22 *See infra* notes 24-49 and accompanying text.

23 *See infra* notes 50-132 and accompanying text.

24 *See* VAN DYKE, *supra* note 1, at xii-xiii.

25 *See id.* Van Dyke argues that "[i]n the United States, as in England where the jury originated, community participation is the choice over decision-making by 'experts.' " *Id.* at xii. Van Dyke suggests that legal connoisseurs or trained experts are not the best judges of whether a social injustice has occurred. *Id.* Instead, ordinary people from the community will be less likely to have formed prejudgments and, thus, will be more likely to bring fair and impartial perspectives to the criminal justice system. *See id.*

26 100 U.S. 303 (1880).

27 *Id.* at 304-05.

28 *Id.* at 304. Justice Strong perceived the purpose of the fourteenth amendment to be:

> [to] secur[e] to a race recently emancipated, a race that through gen-

acknowledged that the exclusion of members of the criminal defendant's race from the jury is proscribed by the fourteenth amendment.[29] Recognizing that a group of one's peers necessarily includes members of one's race, the court concluded that the defendant was entitled to a jury where members of his race had not been excluded by law.[30]

The Justice emphasized that the equal protection clause not only operates in a prohibitory manner with respect to state discriminatory action, but also creates rights in black individuals to be free from race based distinctions.[31] Justice Strong also acknowledged the right of an excluded black juror to participate equally in the administration of justice by ruling that the juror, too, is deprived of the equal protection of the laws under facially discriminatory statutes similar to West Virginia's.[32] The Court reasoned that permitting such discriminatory practices placed a

---

> erations had been held in slavery, all the civil rights that the superior race enjoy. . . . The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted.

Id. at 306 (citing *Slaughterhouse Cases*, 83 U.S. 36 (1872)). After interpreting the language of the fourteenth amendment, the Court concluded that "[w]hat is this but declaring that the law in the States shall be the same for the black as for the white." *Id.* at 307.

29 *Id.* at 308. Justice Strong observed that a criminal defendant has a right to a trial by jury and that by definition a jury is a "body of men composed of the peers or equals of the person whose right it is selected . . . to determine . . . ." *Id.* Peers are "neighbors, fellow, associates, [and] persons having the same legal status in society as that which [the defendant] holds." *Id.*

30 *Id.* at 309. The court illustrated the soundness for its ruling by suggesting that it would undoubtedly be objectionable to require a white man to submit to a criminal trial by a jury that excluded all white men. *Id.*

31 *Id.* at 307-08. The Court posited:

> The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,- the right to exemption from unfriendly legislation against them distinctively as colored,- exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discrimination which are steps towards reducing them to the condition of a subject race.

Id.

32 *See id.* at 308. Although no juror in *Strauder* claimed that he was the victim of discrimination, the court nonetheless enunciated a juror's right to be free from such oppression. *See id.*

brand upon blacks as an inferior race and perpetuated the racial prejudice that the Constitution was designed to prevent.[33]

The *Strauder* decision set the backdrop for a steady progression of cases challenging racial discrimination in jury selection,[34] but also defined some limits to the equal protection approach. For example, *Strauder* implied that the criminal defendant must be of the same race as the excluded juror to raise a discrimination claim.[35] *Strauder* would also seem to preclude a white defendant from raising a claim that blacks were unlawfully excluded from his jury.[36] Today, a criminal defendant can assert a discrimination claim for racially-based exclusion regardless of whether the excluded juror is the same race as the defendant.[37]

2. The Sixth Amendment

The sixth amendment offered a useful alternative for alleging and proving discrimination in jury selection where the equal protection clause proved unavailing. This alternate approach to curing racial discrimination in assembling the venire was firmly established in the Supreme Court decision *Taylor v. Louisiana*.[38]

---

[33] *Id.* The Court again supported its position by proposing that it would certainly be an uncontested denial of the equal protection of the laws if white men were denied the opportunity to participate in jury service. *Id.* It thus concluded that blacks should receive the same treatment. *See id.*

[34] Most of the cases that followed *Strauder* attempted to define a prima facie case of discrimination. *See* Castaneda v. Partida, 430 U.S. 482 (1977) (prima facie case of discrimination established when 79% of the general population is Mexican-American but only 39% are summoned for jury service); Turner v. Fouche, 396 U.S. 346 (1970) (23% underrepresentation of blacks on venire established prima facie case); Whitus v. Georgia, 385 U.S. 545 (1967) (prima facie case established where 27% of taxpayers were black and only 9% of those were present on venire); Swain v. Alabama, 380 U.S. 202 (1965) (10% underrepresentation of blacks on venire was insufficient to raise prima facie case); Hernandez v. Texas, 347 U.S. 475 (1954) (prima facie case established when no Mexican-Americans served on jury commission for 25 years); Cassel v. Texas, 339 U.S. 282 (1950) (jury commissioners discriminated by choosing jurors only from people they knew, resulting in the exclusion of blacks); Norris v. Alabama, 294 U.S. 587 (1935) (evidence that a large number of blacks were qualified to be jurors but that none had been called in more than a generation constituted prima facie case); Thomas v. Texas, 212 U.S. 278 (1909) (prima facie burden was not met when the accused merely shows that no members of his race were on the jury); Neal v. Delaware, 100 U.S. 370 (1880) (effectively discriminatory jury selection statutes are invalid).

[35] *Strauder*, 100 U.S. at 310. In conclusion, the Court stated that "discriminating in the selection of jurors, . . . amounts to a denial of the equal protection of the laws to a *colored man* when he is put upon trial for an alleged offence [sic] against the State. . . ." *Id.* (emphasis added).

[36] *See id.*

[37] Powers v. Ohio, 111 S. Ct. 1364 (1991).

[38] 419 U.S. 522 (1975).

In *Taylor*, a male convicted of aggravated kidnapping by an all male jury, challenged a state statute which permitted a woman to serve on a jury only if she expressed her desire to be a juror in writing.[39] Taylor claimed that he was denied his constitutional right to "a fair trial by jury of a representative segment of the community" as guaranteed by the sixth amendment.[40]

Justice White, writing for the majority, first held that Taylor need not have been a member of the group excluded from jury service to have standing to object to the jury's composition.[41] The Court explained that the sixth amendment guarantee that the jury be representative of the community is a constitutional entitlement for all defendants, therefore, any defendant has standing to assert the claim.[42] Second, the Court held that the sixth amendment prohibits the systematic exclusion of distinctive groups from jury wheels and venires to preclude the obtainment of a jury that fairly represents the community.[43]

Applying an equal protection analysis to the *Taylor* facts illustrates the advantages of a sixth amendment attack on jury discrimination. For example, the equal protection clause had routinely required the defendant to be a member of the same distinctive group as the excluded juror.[44] Taylor was male and, most likely, would not have been allowed to challenge the exclusion of women from his jury under the equal protection clause.[45] Furthermore, equal protection requires proof of purposeful discrimination while the sixth amendment merely requires a show-

---

39 *Id.* at 523-24. The challenged statute provided, in relevant part:

> The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service.

Id. at 523 n.1 (quoting LA. CONST. of 1921, art. VII, § 41 (repealed 1975)).

40 *Id.* This claim was made possible by the Supreme Court's ruling in Duncan v. Louisiana, 391 U.S. 145 (1968). *Duncan* held that the sixth amendment is applicable to the states through the fourteenth amendment's due process clause. *Id.* at 149.

41 *Taylor*, 419 U.S. at 526.

42 *Id.* The Court relied on Peters v. Kiff, 407 U.S. 493 (1972), for support in allowing standing to a defendant who is not a member of the juror's group. The Court further recognized that *Peters* was not based on a sixth amendment argument. *Taylor*, 419 U.S. at 526.

43 *Taylor*, 419 U.S. at 538.

44 *See infra* note 89 and accompanying text. *But see* Powers v. Ohio, 111 S. Ct. 1364 (1991) (racial identity between excluded juror and objecting defendant not required).

45 *See infra* notes 55-81 and accompanying text.

ing that certain groups were underrepresented on the jury wheel or venire.[46] Taylor had ample proof that his jury selection grossly underrepresented females,[47] but his equal protection allegations would have required a further showing that the underrepresentation was the *intent* of the jury commissioner.[48] Undoubtedly, the sixth amendment has broad power to eliminate discrimination in the process of assembling the jury venire. Thus, the sixth amendment fills in the gaps in the equal protection approach.[49] Together, the two amendments provide comprehensive protection against unlawful discrimination during the selection of jury wheels and venires.

B. Peremptory Challenge Caselaw

Unfortunately, constitutional attacks on discrimination during the final petit jury selection are complicated by more obscure legal questions than those involved where the challenged discrimination occurred during venire assembly. At the heart of these questions is the peremptory challenge, whereby attorneys can strike jurors without stating a reason,[50] and where discrimination, therefore, thrives.[51] While the peremptory challenge is not a constitutional guarantee, it has nevertheless been considered an essential component of jury trials.[52] Because the challenge is designed to promote fairness and impartiality in the

---

[46] Magid, *supra* note 11, at 1088; *See also* Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979) (statistics are only evidence of purpose for equal protection claims, but are determinative for sixth amendment fair cross-section claims). The Court has firmly established that racial discriminatory impact alone is not enough to show an equal protection violation. *See* Washington v. Davis, 426 U.S. 229, 240 (1976); Alexander v. Louisiana, 405 U.S. 625, 630 (1972); Akins v. Texas, 325 U.S. 398, 403 (1945). Disproportionate impact can, however, be so substantial that it amounts to a prima facie case of discriminatory intent. *See* Castaneda v. Partida, 430 U.S. 482, 495 (1977) (equal protection violation may exist based on underrepresentation alone if it is substantial); *Washington*, 426 U.S. at 241 (systematic exclusion of blacks from jury service is, in itself, "such an unequal application of the law . . . as to show intentional discrimination."(citation omitted)).

[47] *Taylor*, 419 U.S. at 524. The Court noted that women in the judicial district in question numbered 53% of the population eligible for jury service. *Id.* Only 10% of the persons on the jury wheel were women. *Id.* Of the 1,800 people who were called to venires in the district, a total of 12 were female. *Id.* In Taylor's case, 175 people were on the venire, none of whom were female. *Id.*

[48] *See e.g.*, *Alexander*, 405 U.S. at 630.

[49] *See* Comment, *Skin Color*, *supra* note 11, at 175 (*Strauder* "left [the door] ajar for states to utilize subtle ways of keeping blacks off juries" but *Taylor* "essentially . . . stands for a requirement of inclusion").

[50] *See supra* note 8.

[51] *See* Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

[52] *See infra* note 59.

criminal justice system, the courts have been reluctant to place undue restrictions on its use.[53] When unrestrained, however, the peremptory challenge becomes a forceful tool with which to effect unlawful discrimination. The ongoing debate, therefore, concerns the parameters the sixth and fourteenth amendments should place on the use of the "venerable" peremptory challenge.[54] Perusal of peremptory challenge discrimination caselaw exposes a myriad of opinions that sound of ambiguity and conflict.

1. The Equal Protection Clause

The Supreme Court first applied the fourteenth amendment equal protection clause to limit peremptory challenges in *Swain v. Alabama*.[55] In *Swain*, a black man was convicted by an all white jury of raping a white woman.[56] Two black venirepersons were exempted and the prosecutor peremptorily struck the only six eligible black jurors from the jury panel.[57] Swain asserted an equal protection claim alleging that qualified blacks had been stricken from the jury in violation of the equal protection clause, and that qualified blacks had been "consistently and systematically" stricken from juries in past criminal cases in violation of the equal protection clause.[58] Justice White rejected the first allegation, reasoning that judicial review of a prosecutor's reasons for striking a juror would undermine the tradition of the peremptory challenge, a trend the Court was unwilling to initiate.[59] Next, the Court evaluated the defendant's allegation that systematic dis-

---

53 *See supra* notes 53-63 and accompanying text.

54 There is another facet of the dispute that is beyond the scope of this comment. Some have proposed that the peremptory challenge should be abolished altogether. *See Batson*, 476 U.S. at 105-08 (1986) (Marshall, J., concurring); Alschuler, *The Overweight Schoolteacher From New Jersey and Other Tales: The Peremptory Challenge After Batson*, 25 CRIM. L. BULL. 57, 74-78 (1989); Note, *Challenging the Peremptory Challenge: Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges*, 67 WASH. U.L.Q. 547, 572-73 (1989).

55 380 U.S. 202 (1965).

56 *Id.* at 203-05.

57 *Id.* at 205.

58 *Id.* at 222-23. Swain also raised an equal protection claim alleging that the venire was unconstitutionally discriminatory, but the Court quickly dismissed this argument. *Id.* at 205. Absent proof that different standards were applied to blacks, that a significant number of blacks were otherwise qualified, or that the commissioners acted purposely to discriminate, the Court found that a mere showing of underrepresentation of blacks on the venire was not enough to attack the composition of the venire. *See id.* at 209.

59 *Id.* at 222. While observing that the Constitution does not guarantee the use of the challenges, the Court asserted that it is a necessary mechanism not only to

crimination violated the fourteenth amendment.[60] The Court conceded that a systematic showing of discrimination in the use of peremptory challenges in "case after case, whatever the circumstances," could constitute an equal protection violation.[61] Swain, however, was unable to satisfy his burden of proving systematic discrimination.[62] Not surprisingly, few defendants, in a long line of cases after *Swain*, were able to meet this practically insurmountable burden of proof.[63] It appeared that *Swain* left the criminal defendant only a rather hollow equal protection claim with respect to peremptory challenges.

Twenty-one years later, the Supreme Court reconsidered and overruled the *Swain* interpretation of the equal protection

---

achieve an impartial jury, but also to insure an "appearance of justice." *Id.* at 219. The Court stated:

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that [the] peremptory challenge is a necessary part of trial by jury. . . . The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way, the peremptory satisfies the rule that 'to perform its high function in the best way,' justice must satisfy the appearance of justice.

Id. (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)). The driving rationale behind the peremptory challenge is that both sides will employ them to eliminate jurors perceived to be most partial to the opposing side, leaving a relatively neutral body of individuals to compose the jury. *See id.* In order to accomplish this, the Court advanced the need to allow the exercise of the challenges "with full freedom." *Id.* (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)). It therefore shielded a prosecutor's use of the device with a presumption of constitutionality. *Id.* at 222.

Many have criticized the *Swain* Court's premise that the statutory right to peremptory challenges should prevail over a constitutional right to the equal protection of the laws. *See id.* at 244 (Goldberg, J., dissenting); McCray v. Abrams, 750 F.2d 1113, 1130 (2d Cir. 1984) (where peremptories conflict with constitutional rights, the peremptory challenge must yield); Note, *supra* note 54, at 572 (the "court *must* withhold the peremptory challenge should the challenge impair a constitutionally granted right") (emphasis in original).

60 *Swain*, 380 U.S. at 222-23.

61 *Id.*

62 *Id.* at 226.

63 *See* United States v. Jenkins, 701 F.2d 850, 858-60 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982). Other courts have reflected on the difficulty of the burden of proof remaining after *Swain*. *See* Batson v. Kentucky, 476 U.S. 79, 92 (1986) (*Swain* placed a "crippling burden of proof" on defendants) (citations omitted); *McCray*, 750 F.2d at 1120 ("almost no other defendants in the nearly two decades since the *Swain* decision have met this standard of proof"); People v. Wheeler, 22 Cal.3d 258, 284, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909-10 (1978) (*Swain* made it "virtually impossible" for defendants to assert their constitutional rights).

clause regarding peremptory challenges in its landmark decision, *Batson v. Kentucky*.[64] Batson was a black man convicted of two crimes in a Kentucky state court by an all white jury.[65] During the voir dire, the prosecutor employed peremptory challenges to eliminate the only four black persons on the venire.[66] The Court reviewed the defendant's claim under an equal protection theory.[67] The Court, per Justice Powell, held first that the equal protection clause applied to limit peremptory challenges executed in a racially discriminatory manner.[68] Moreover, the Justice renovated *Swain*'s burden of proof by holding that a defendant need only prove intentional discrimination based on *the facts of his own case* and not through a detailed account of continuous and systematic practices.[69]

Justice Powell determined that because the fourteenth amendment proscribes "all forms of *purposeful* racial discrimination in [the] selection of jurors," discriminatory practices at the petit jury selection stage, no less than at the venire stage, are unconstitutional.[70] The Justice reasoned that a defendant is denied equal protection of the laws when the state compiles jury wheels and venires in a race-neutral manner, but then proceeds to discriminate at subsequent stages in the jury selection process.[71] Affirming that a defendant has "the right to be tried by a jury whose members [have been] selected pursuant to nondiscriminatory criteria," the Court concluded that peremptory challenges are subject to scrutiny under the equal protection clause.[72]

---

64 476 U.S. 79 (1986).

65 *Id.* at 82-83.

66 *Id.* at 83.

67 *Id.* at 84 n.4. The petitioner only raised a sixth amendment claim on appeal before the Supreme Court. *Id.* The Court presumed that the petitioner only raised this issue "to avoid inviting the Court directly to reconsider one of its own precedents." *Id.* at 85 n.4. In light of this presumption and because the State of Kentucky implored the Justices to reassess *Swain*, the Court agreed to consider Batson's claim under equal protection and declined to address the sixth amendment claim. *Id.*

68 *See id.* at 89.

69 *Id.* at 92-96 (emphasis added).

70 *Id.* at 88 (citations omitted) (emphasis added).

71 *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

72 *Id.* at 85-86, 89. The Court also affirmed the rights of two other constituencies in such cases of discrimination. First, the Court recognized the right of an individual to participate in jury service. *Id.* at 87. The Court advanced that race is unrelated to a person's qualifications as a juror and should not be a component in jury selection. *Id.* Second, the Court determined that the harm is so pervasive that it impacts upon the entire community. *Id.* Because discriminatory jury selection

Next, the Court examined the burden of proof that *Swain* imposed on defendants raising a discrimination claim.[73] Rejecting the *Swain* requirement of a systematic showing, the Court held that the defendant can establish prima facie discrimination evidence in the petit jury selection based solely upon the facts of his own case.[74] Justice Powell based this new standard on prior holdings where the Court had found prima facie proof of venire discrimination based solely on the representativeness of the particular venire at issue.[75] The Court emphasized that racial discrimination need not surface in a consistent pattern to invoke the equal protection clause.[76] The Court determined that a "consistent discrimination" requirement was inconsistent with the spirit and intent of the equal protection clause.[77]

Justice Powell then set forth the proper elements of a prima facie discrimination case.[78] The Court stipulated that if the defendant can establish a prima facie discrimination case, the burden of proof will shift to the state to justify its actions.[79] Justice Powell cautioned that prosecutors may not justify their actions with broad declarations that black jurors are overly favorable to black defendants "because of their shared race."[80] To assuage apprehension that the *Batson* holding would essentially destroy the nature of the peremptory challenge, the Court clarified that the prosecutor's explanation will not have to meet the level of justification demanded of a challenge for cause.[81]

---

procedures are visible to the public, such practices operate to sabotage public confidence in our criminal justice system. *Id.* Without question, these were consequences of discrimination that the Court aimed to ameliorate in the *Batson* holding.

73 *Id.* at 90.

74 *Id.* at 96.

75 *Id.* at 95 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977); Washington v. Davis, 426 U.S. 229, 241 (1976); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972); Whitus v. Georgia, 385 U.S. 545, 552 (1967)).

76 *Id.* (citation omitted).

77 *Id.* at 95-96 (quoting McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from denial of certiorari)).

78 *Id.* at 96. The Court determined that first, the defendant must demonstrate his membership in a cognizable racial group and that the state has employed peremptory challenges to remove members of that race from the venire. *Id.* The Justice clarified that the defendant may, in meeting his proof, rely on the Court's determination that peremptory challenges are not immune from attack under the equal protection clause. *Id.* Lastly, the defendant must establish that all of the relevant facts of his case "raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race." *Id.*

79 *Id.* at 97.

80 *Id.*

81 *Id.* Unconvinced by this assurance, the dissent insisted that the majority's holding would result in a virtual breakdown of the peremptory challenge. *See id.* at

The *Batson* decision was a remarkable step in the crusade to eliminate racial discrimination in the use of peremptory challenges. Unfortunately, the holding was extremely narrow, leaving many holes in its grant of protection and many issues yet unresolved. In addition, *Batson* opened inquiry on whether the defense also should be limited in its use of peremptory challenges.

2. The Sixth Amendment

Because of dissatisfaction with the equal protection interpretations articulated by the Court, the sixth amendment became an attractive doctrine for stopping discriminatory jury selection practices at the petit jury stage. The sixth amendment approach to eradicate discrimination in the use of peremptory challenges actually evolved prior to *Batson*, when courts sought ways to circumvent the unreasonable *Swain* burden of proof. Some state and lower federal courts relied on either the federal Constitution's sixth amendment or a state constitutional equivalent to combat discrimination.[82]

a. *State and Lower Federal Court Decisions*

State courts have chosen to recognize the application of the sixth amendment to attack the discriminatory use of peremptory challenges. The Supreme Court of California pioneered this tactic to challenge the discriminatory use of peremptory challenges in its ruling in *People v. Wheeler*.[83] The highest court in Massachusetts immediately followed California's lead in *Commonwealth v. Soares*.[84] In *Wheeler* and *Soares*, black defendants alleged that black jurors had been peremptorily challenged and eliminated from the jury because of race.[85] Both courts recognized that such ex-

127 (Burger, J., dissenting). Justice Burger stated that "[a]nalytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.'" *Id.* (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)). The Chief Justice relied on *Swain* for support. *Id.* (quoting Swain v. Alabama, 380 U.S. 202, 222 (1965) (If prosecutors were required to justify their use of peremptory challenges, "[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards").

82 *See infra* notes 83-104 and accompanying text.

83 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

84 377 Mass. 461, 387 N.E.2d 499 (1979).

85 *Wheeler*, 22 Cal. 3d at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893; *Soares*, 377 Mass. at 473, 387 N.E.2d at 508.

clusion violated their respective states' constitutional guarantee of a jury trial.[86] These courts specifically disclaimed the requirement that the jury "mirror" the composition of the community, but each attempted to provide as close a representation of the community on the jury as possible.[87]

While recognizing that attorneys may use peremptory challenges to eliminate specific bias[88] from the jury, the *Wheeler* court determined that the exclusion of a juror based upon an assumption that he would be biased in favor of other members of his racial group violated California's state constitutional provision for trial by jury.[89] In constructing a remedy, the court first delineated factors that a defendant must show in order to establish a prima facie case of discrimination.[90] The court continued that the prima facie case would be rebutted only where the prosecutor could justify the challenges on grounds other than group bias.[91]

---

86 *Wheeler*, 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903; *Soares*, 377 Mass. at 488, 387 N.E.2d at 516. The California constitution provided that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." CAL. CONST. art. I, § 16 (West 1974). Similarly, the state constitution of Massachusetts stated that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." MASS. CONST. art. XII (1978). Neither constitution explicitly granted a right to an impartial jury or a right to a representative cross-section, but both courts construed the right to jury trial to necessarily include these rights. *Wheeler*, 22 Cal. 3d at 265, 583 P.2d at 754, 148 Cal. Rptr. at 895; *Soares*, 377 Mass. at 478, 387 N.E.2d at 510-11.

87 *Wheeler*, 583 P.2d at 762, 148 Cal. Rptr. at 903; *Soares*, 377 Mass. at 488, 387 N.E.2d at 516.

88 The court defined specific bias as "a bias relating to the particular case on trial or the parties or witnesses thereto." *Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. The court explained that peremptory challenges exercised on specific bias "do not significantly skew the population mix of the venire in one direction or another; rather, they promote the impartiality of the jury without destroying its representativeness." *Id.*

89 *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The court expressed its opinion that the federal Constitution's sixth amendment also compelled its holding. *Id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900. The court, however, did not want to rely solely on the federal Constitution because to do so would have exposed the holding to Supreme Court review. *See id.* at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908. The court had little faith that the Supreme Court would endorse its decision. *Id.* Specifically, the court articulated "[w]e therefore assume that if the present question were before the high court it would reaffirm *Swain* and reach the same result under the representative cross-section rule as it did under the equal protection clause." *Id.*

90 *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

91 *Id.* The court, outlining the elements of the prima facie case, posited:

> First, . . . [the defendant] should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning

While the court was not petitioned to decide the issue, it offered its opinion that defense counsel peremptory challenges would also be subject to the state constitutional limitations set forth in the case.[92]

In *Soares*, the Supreme Judicial Court of Massachusetts, relying heavily on *Wheeler*, agreed that the exercise of peremptory challenges is properly subjected to the defendant's constitutional right to a fair trial by jury.[93] The court criticized the discriminatory use of challenges at the petit jury stage because the discrimination effectively nullified the very purpose of imposing a representative cross section requirement during the selection of the venire, which is to achieve diversity of opinion in the jury.[94] Additionally, the *Soares* court pointed out that by the nature of the defendant's minority status he is "doomed to failure" in acquiring a representative jury when peremptory challenges go unrestrained.[95] Noting that the number of minorities in the venire is usually lower than the number of peremptory challenges allowed to the prosecutor, the court feared that it would be possible for the prosecution to completely exclude minorities from jury participation.[96] The *Soares* decision, like *Wheeler*, imposed

---

> of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.

Id. (footnote omitted).

Interestingly, much of the key phrases and ideas used by the *Wheeler* court would later reappear in the *Batson* opinion. For example, both courts set forth the concept for the prima facie case with similar elements in each. *See supra* note 89 and accompanying text. Furthermore, both *Wheeler* and *Batson* emphasized that the prosecutor's explanation for his peremptories is not expected to rise to that of the challenge for cause. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986); *Wheeler*, 22 Cal. 3d at 281-82, 583 P.2d at 765, 148 Cal. Rptr. at 906. Lastly, both courts expressed confidence in trial judges to discern when a true prima facie case of discrimination has been established. *Batson*, 476 U.S. at 97; *Wheeler*, 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906.

92 *Wheeler*, 22 Cal. 3d at 282-83 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29. The court stated:

> we observe for the guidance of the bench and bar that [the prosecutor] has [the] right [to object to the misuse of peremptories by the defense] under the constitutional theory we adopt herein: the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community.

Id.

93 *Commonwealth v. Soares*, 377 Mass. 461, 488, 387 N.E.2d 499, 516 (1979).

94 *Id.* at 486, 387 N.E.2d at 515.

95 *Id.* at 488, 387 N.E.2d at 516.

96 *Id.* The number of non-minority venire members, on the other hand, exceeds

limitations on the defense counsel.[97]

In *Booker v. Jabe*,[98] a federal court relied on the federal Constitution's sixth amendment, rather than on a state constitutional equivalent, to attack discriminatory peremptory challenges.[99] The Court of Appeals for the Sixth Circuit interpreted the impartial jury guaranteed by the sixth amendment to mean a jury which has been selected "without systematic and intentional exclusion" of particular groups.[100] *Booker*, like *Wheeler* and *Soares*, did not advocate that the representative cross-section requirement guarantees the defendant an actual jury that "mirrors" the community, but rather prohibits the systematic exclusion of jurors based on race because it deprives the defendant of the *possibility* of obtaining a jury that fairly represents the community.[101] The court stressed that the peremptory challenge is only a statutory right and that it must accordingly yield to the constitutional mandate of the sixth amendment.[102] The *Booker* court further held that both the prosecuting and defense attorneys are subject to the same sixth amendment limitations.[103] State courts are free to construe their analogues to the sixth amendment without fear that the United States Supreme Court will adjudge their interpretations to be too protective or too restrictive of the peremptory

---

that of peremptory challenges so that it is virtually impossible to totally eliminate them from the jury. *Id.*

97 *Id.* at 489 n.35, 387 N.E.2d at 517 n.35.

98 775 F.2d 762 (6th Cir. 1985), *cert. denied*, 478 U.S. 1001 (1986).

99 *Id.*

100 *Id.* at 768 (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946)).

101 *Id.* at 770-71 (emphasis added). *Accord* McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979).

102 *See Booker*, 775 F.2d at 771. The court noted that because the right to the peremptory challenge is granted through statute, "Congress or any state legislature could abolish [it] at will." *Id.* (citation omitted).

103 *Id.* at 772. The court stated:

> The Supreme Court has repeatedly reversed verdicts rendered by improperly constituted juries . . . on the ground that an improperly unrepresentative jury impairs the public's interest in a jury system of manifest integrity. The spectacle of a defense counsel systematically excusing potential jurors because of their race or other shared group identity while the prosecutor and trial judge were constrained merely to observe, could only impair the public's confidence in the integrity and impartiality of the resulting jury. Therefore, we hold that under the Sixth Amendment, neither prosecutor nor the defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a criminal petit jury.

Id. (citations omitted).

challenge.[104] Previously, the federal courts were also at liberty to apply the sixth amendment to discrimination occurring at the petit jury stage because the United States Supreme Court had not yet adjudicated the issue. In fact, the Court passed up many opportunities to reach a decision on the sixth amendment claim.[105] The Court, however, recently decided to rule unequivocally in *Holland* that the sixth amendment is inapplicable to discrimination claims arising from peremptory challenges.[106]

b. *Holland v. Illinois*

In *Holland*, the Supreme Court considered the allegations of discrimination by Daniel Holland, a white man charged in Illinois state court with various crimes, including rape and armed robbery.[107] Because the prosecutor had peremptorily struck the only two blacks on the petit jury, Mr. Holland objected to the state's actions on both equal protection and sixth amendment grounds.[108] The United States Supreme Court granted the peti-

---

104 *Cf.* State v. Baker, 81 N.J. 99, 112, 405 A.2d 368, 374 (1979) (states are "free to interpret [their] constitution[s] and statutes more stringently") (citing Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

105 *See* Booker v. Jabe, 478 U.S. 1001 (1986); United States v. Childress, 464 U.S. 1063 (1984); United States v. Thompson, 469 U.S. 1024 (1984). *See also* Teague v. Lane, 109 S. Ct. 1060 (1989). In *Teague*, the sixth amendment issue was before the Court but it was never addressed because the Court first determined that a decision to extend the sixth amendment to the petit jury would not apply retroactively to the case at issue, as it was on collateral review. *Id.* at 1063. This determination foreclosed the sixth amendment claim.

The closest the Court has come to deciding the issue was in *Lockhart v. McCree*, 476 U.S. 162 (1986). In *Lockhart*, the Court rejected a sixth amendment attack on the exclusion from petit juries of "*Witherspoon*-excludables", who are veniremen who admit that they could never vote for a death penalty sentence. *Id.* at 173. The Court held that such prospective jurors may be challenged for cause reasoning that the fair cross-section requirement should not apply to the petit jury. *Id.* The implications of this holding were uncertain. The *Lockhart* Court clearly stated that application of a "fair cross-section requirement to petit juries would be unworkable and unsound. . . ." *Id.* at 174. While some have found this holding to be devastating for sixth amendment claims attacking peremptory challenges, the scope of the sixth amendment was still unclear. Mayfield, *Batson and Groups Other Than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377, 414-15 (1988). The Court distinguished the facts of *Lockhart* from cases involving the exclusion of women, blacks, or other ethnic groups from jury service. *Lockhart*, 476 U.S. at 175. The Court advanced that these types of exclusions would "clearly contravene [] . . . [the] purpose of the fair cross-section requirement." *Id.*

106 Holland v. Illinois, 110 S. Ct. 803, 806 (1990).

107 *Id.* at 805.

108 *Id.* The trial court overruled Holland's objection and the jury proceeded to convict. *Id.* After the intermediate appellate court reversed the convictions on other grounds, the Illinois Supreme Court reinstated them, thereby rejecting Mr. Holland's attack on the prosecutor's use of the challenges. *Id.*

tion for certiorari to review only the sixth amendment claim.[109]

Justice Scalia, writing for the Court, began his analysis by addressing the issue of whether a white defendant has standing to challenge the prosecutor's elimination of blacks from the jury.[110] The Justice acknowledged that the petitioner did have standing to bring a sixth amendment claim because this provision "entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs."[111]

The Court subsequently rejected any possibility of using the sixth amendment to limit peremptory challenges by distinguishing the scope of the sixth amendment from that of equal protection.[112] Justice Scalia recalled that in *Batson*, equal protection applied to limit peremptory challenges because of the pervasive nature of the fourteenth amendment, not because the peremptory challenge is "inseparably linked" to other stages of the jury selection process, namely assembly of the venire, which is subject to sixth amendment limitations.[113] The Justice explained that the sixth amendment guarantees the defendant a jury "drawn *from* a fair cross section of the community," not a jury that reflects the community proportionately after it has been drawn.[114] Once a representative cross-section venire has been assembled, the majority advocated that nothing in the sixth amendment forbids an attorney from using peremptory challenges to eliminate biased jurors.[115]

Justice Scalia further stated that an initially representative

---

109 Holland v. Illinois, 489 U.S. 1051 (1989).

110 *Holland*, 110 S. Ct. at 805.

111 *Id.*

112 *Id.* at 806-07.

113 *Id.* at 807.

114 *Id.* (quoting Taylor v. Louisiana, 419 U.S. 522, 527 (1975)).

115 *Id.* Justice Scalia clarified that the sixth amendment secures the defendant an *impartial* jury, not a *representative* one. *Id.* The purpose of the impartial guarantee, the Justice added, is to protect the criminal defendant from being forced to submit to trial by a jury composed under the state's unchecked discretion. *See id.* Without an impartiality requirement, the state would have such wide discretion in composing the jury that it would be analogous to having an unlimited number of peremptory challenges. *Id.*

The court disclaimed, however, that peremptory challenges allow the state "to stack the deck in its favor." *Id.* Justice Scalia explained that "once a fair hand is dealt" in the venire, the state may "use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side." *Id.*

jury may be sacrificed at the petit jury stage as long as it serves a legitimate state interest.[116] The Court determined that the goal of an impartial jury is a legitimate state interest that depends upon the peremptory challenge as an integral part of achieving that interest.[117] On a more practical level, the Justice observed that if the sixth amendment were allowed to limit peremptory challenges, the defendant would have a claim whenever any distinctive group is eliminated.[118] The Court expressed its concern that this result would effectively erode the utility of the peremptory challenge.[119]

The dissenting opinions, authored by Justices Marshall and Stevens, criticized the majority in demanding that there should be no distinction between the venire and the petit jury for purposes of sixth amendment application.[120] For example, Justice Stevens asserted that the fair cross-section principle is intended to require that the selection measures for choosing a jury are neutral.[121] The Justice contended that discrimination at the petit jury level deprives the defendant of the possibility of obtaining a neutral and representative jury.[122] Noting that the sixth amendment guarantees an impartial jury and not merely an impartial venire, Justice Stevens concluded that discrimination in the use of peremptory challenges violates the sixth amendment.[123] Justice Marshall's dissent similarly approved of application of the sixth amendment to all stages of jury selection.[124]

---

116 *Id.* at 809 (citing Lockhart v. McCree, 476 U.S. 162, 175 (1986)).

117 *Id.* at 808.

118 *Id.* at 809. For a discussion of what groups are "distinctive" for purposes of the sixth amendment, see generally Magid, *supra* note 11, at 1104-11 (groups found to be sufficiently distinctive for fair cross-section purposes include women, blacks, Mexicans, Spanish surnamed people, Latins in Miami, Native Americans, whites, blue collar workers, the less educated, Hispanics and those with deficient English skills (citations omitted)).

119 Holland v. Illinois, 110 S. Ct. at 809 (quoting *Lockhart*, 476 U.S. at 178). The petitioner argued that the sixth amendment protection need not be amenable to groups other than blacks. *Id.* Justice Scalia retorted, however, "[i]f the goal of the [s]ixth [a]mendment is representation of a fair cross section of the community on the petit jury, then intentionally using peremptory challenges to exclude *any* identifiable group should be impermissible—which would, as we said in *Lockhart*, 'likely require the elimination of peremptory challenges.' " *Id.*

120 *See id.* at 816 (Marshall, J., dissenting); *id.* at 825 (Stevens, J., dissenting).

121 *Holland*, 110 S. Ct. at 826 (Stevens, J., dissenting).

122 *Id.* at 824-25 (Stevens, J., dissenting) (quoting Williams v. Florida, 399 U.S. 78, 100 (1970)).

123 *Id.* at 825 (Stevens, J., dissenting).

124 First, the Justice advanced that the defendant would be protected from overzealous prosecutors if he were ensured the fair possibility of a representative petit jury. *Id.* Second, Justice Marshall stressed that the sixth amendment must apply to

The dissenters exposed genuine concerns for eliminating racial discrimination in our society, but unfortunately offered faulty constitutional interpretations to support their reasoning. For example, both Justices Marshall and Stevens advocated that the sixth amendment is violated when jurors are "purposely excluded"[125] or "arbitrarily remove[d]"[126] on a discriminatory basis from the jury. The Justices construed the sixth amendment to proscribe intentional discrimination; as a general proposition, however, the sixth amendment has never been concerned with whether the challenged behavior was purposeful.[127] To that extent, the dissenters seem to confuse the sixth amendment issue with an equal protection analysis, which does require intent.[128] Furthermore, Justice Marshall chided the majority's failure to assure jurors the ability to participate in the administration of justice.[129] The sixth amendment, however, only protects defendant rights and is not a source of protection for the excluded juror.[130] Therefore, utilizing a sixth amendment analysis, a juror's rights cannot be the basis for limiting peremptory challenges.

Notably, Justice Scalia deliberately added that the *Holland* decision did not "hold that this particular (white) defendant does not have a valid constitutional challenge to such racial exclusion."[131] The Justice explained that the Court's holding was restricted to the sixth amendment issue and did not assess the petitioner's claim in light of the equal protection clause.[132] Addi-

---

the petit jury to preserve public confidence in the criminal justice system, reasoning that if peremptory challenges continued to be executed in a racially discriminatory manner, the public would perceive the judicial process as inherently biased. *Id.* Third, the Justice contended that endorsement of the sixth amendment argument would assure jurors the ability to participate in the administration of justice. *Id.* Also, Justice Marshall disavowed setting a quota for a requisite number of jurors from certain distinctive groups, but rather demanded that jurors not be "purposely excluded" on the basis of their race. *Id.* at 817 (Marshall, J., dissenting).

125 *Id.* at 817 (Marshall, J., dissenting).

126 *Id.* at 825 (Stevens, J., dissenting).

127 Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979); Magid, *supra* note 11, at 1090-91 ("defendant may prevail on a fair cross-section claim without proving discriminatory intent").

128 *See*, Washington v. Davis, 426 U.S. 229, 239 (1976) (quoting Akins v. Texas, 325 U.S. 398, 403-04 (1945)). Justice Stevens went so far as to say that the equal protection and sixth amendment claims overlap. *Holland*, 110 S. Ct. at 821 n.4 (Stevens, J., dissenting) ("requirement of impartiality is, in a sense, the mirror image of a prohibition against discrimination").

129 *Holland*, 110 S. Ct. at 816 (Marshall, J., dissenting).

130 *See id.* at 809.

131 *Id.* at 811 (footnote omitted).

132 *Id.* at 811 n.3. Justice Stevens urged that the Court should have also reviewed petitioner's equal protection claim, even though Mr. Holland did not raise the issue

tionally, the Court was rather careful not to foreclose an equal protection claim for future defendants.[133] The concurring and dissenting opinions in *Holland* went beyond mere nonforeclosure of this issue by imparting hypothetical treatment of the equal protection issue.[134] Five Justices took the initiative to express support for allowing white defendants, on equal protection grounds, to attack the elimination of black jurors through peremptory challenges.[135]

---

for the Court's review. *Id.* at 820 (Stevens, J., dissenting). This is precisely what the Court did in *Batson*. Mr. Batson raised only a sixth amendment claim, but the Court proceeded to review only the equal protection argument. *See supra* note 67. Justice Scalia responded, however, by stating that *Batson* was an exception to the Court's long standing rule of limiting the scope of their review to questions presented, briefed, and argued before the Court. *Holland*, 110 S. Ct. at 811 n.3. The Justice refused to "convert *Batson* from an unexplained departure to an unexplained rule." *Id.*

133 *See Holland*, 110 S. Ct. at 811.

134 *Id.* at 811 (Kennedy, J., concurring); *id.* at 813-14 (Marshall, J., dissenting); *id.* at 820-22 (Stevens, J., dissenting).

135 *Id.* at 811-12 (Kennedy, J., concurring); *id.* at 813-14 (Marshall, J., dissenting); *id.* at 820-27 (Stevens, J., dissenting).

Recently the Court addressed precisely this issue. *Powers v. Ohio*, 111 S. Ct. 1364 (1991). In *Powers*, a white defendant, was convicted of aggravated murder and attempted aggravated murder. *Id.* at 1366. During jury selection, Powers objected to the state's removal of six black venire persons through the use of the peremptory challenge. *Id.* Powers's objections were overruled and he was subsequently convicted. *Id.*

The Supreme Court limited its review solely to the issue of whether the equal protection clause is violated when the prosecution discriminatorily uses peremptory challenges to exclude jurors who do not share the same race as the criminal defendant. *Id.* at 1367. Justice Kennedy, writing for the majority, determined that *Batson* was not limited to the situation where the defendant and the excluded juror share the same race. *Id.* at 1368. The Court advocated that the State's race based limitation on the right to object has no place in the equal protection or standing jurisprudence. *Id.* In addition to recognizing the harm to a criminal defendant when the impaneled jury contains no "member" jurors, the Court added that discrimination in jury selection also harms the public at large and the excluded juror. *Id.*

Next, the majority addressed the issue of whether the defendant has standing to assert the equal protection rights of the excluded juror. *Id.* at 1370. First, the court recognized that the defendant suffered the requisite injury in fact when the prosecution used the peremptory challenges in a discriminatory fashion. *Id.* at 1372. Additionally, Justice Kennedy stressed that the criminal defendant has a sufficient interest because jury selection discrimination strikes at the heart of the integrity of the criminal proceeding. *Id.*

The second requirement, the majority expressed, is that a special relationship must exist between the third party and the litigant to ensure that the litigant is an effective proponent of the third party's rights. *Id.* Noting the common goal between the defendant and excluded juror of eliminating vestiges of discrimination from the Court proceeding, Justice Kennedy maintained that both the excluded venire person and the criminal defendant may be discouraged by the judicial process. *Id.* The Court added that this "community of interests" leaves no doubt that

II. LIMITATIONS ON THE DEFENSE COUNSEL AFTER *HOLLAND*

Because the Supreme Court's decision in *Holland* closed the chapter on the sixth amendment approach, the equal protection doctrine remains the primary source of protection against the discriminatory use of peremptory challenges.[136] Justice White stated in his *Batson* concurrence that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding."[137] Now, five years after *Batson*, it is clear that Justice White's prophecy was correct and more litigation is needed to fully discern the scope of fourteenth amendment protection in jury selection discrimination cases. Currently, this issue is particularly ripe for review. After *Batson*, the question remains whether defense counsellors can be classified as state actors and thereby be subject to restrictions in their use of peremptory challenges.[138]

To thoroughly purge the jury selection process of discrimination, the attack on racially motivated peremptory challenges should target not only the prosecution, but also defense attorneys. Most would agree that defense counsel who engage in the same practice should not, in the interest of public justice, be able to do so with impunity. Disagreement arises, however, regarding whether the Constitution restrains both defense and prosecutorial activity equally. Assuming that the defendant and

---

the defendant will be a zealous advocate of the excluded juror's rights. *Id.* Further, the majority reminded that the defendant has a personal stake in proving discrimination because a finding of an unlawfully impaneled jury may result in a reversal of the conviction. *Id.*

Finally, the Court articulated the third requirement which examines the likelihood that the excluded juror will assert his own right. *Id.* Despite the juror's legal right to challenge the discrimination, the Court acknowledged that often there are barriers which prevent an excluded venire person from instituting suit. *Id.* at 1373. Justice Kennedy advanced that an excluded juror is not given an opportunity to be heard at the time of his dismissal. *Id.* Additionally, the Justice continued, practical obstacles such as the financial burden of litigation would dissuade the juror from instituting suit. *Id.* The majority concluded, therefore, that the criminal defendant can assert the equal protection rights of a third party who is excluded from jury service on account of race. *Id.*

136 At least one commentator, however, has proposed that peremptory challenges should be limited by neither equal protection nor the sixth amendment, but rather by the due process clause of the fourteenth amendment. *See* Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989).

137 Batson v. Kentucky, 476 U.S. 79, 102 (1986) (White, J., concurring).

138 *See, e.g.*, United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990) (defense in a criminal proceeding are state actors and, thus, limited by *Batson*); *accord* People v. Kern, 75 N.Y.2d 638, 554 N.E.2d 1235 (1990). For a discussion of the issue, *see infra* notes 139-64 and accompanying text.

the state are equally entitled to an impartial jury,[139] a prosecutor, prior to the *Holland* decision, might have challenged the defense's discriminatory exercise of peremptories on sixth amendment grounds. A sixth amendment approach would have been available because, unlike claims under the equal protection clause, the defendant would not have the burden of linking the discrimination to a state activity. The *Holland* decision has rendered academic any discussion of limiting the defense through the sixth amendment.

Thus, it is clear that if a prosecutor wants to challenge the defense's exercise of peremptory challenges, he must resort to a *Batson* equal protection theory. Such a claim can succeed, however, only if the prosecutor can demonstrate that the defense's activity constitutes state or federal action.[140] The difficulty of such proof is patent: unlike the prosecutor who acts as an agent for the state when he participates in jury selection, the defense counsel is influenced and motivated principally by loyalty to his client, a private party. While acts of private parties are not subject to fourteenth amendment scrutiny, a showing of sufficient state involvement in that private activity will trigger constitutional protections.[141] The issue of whether state action exists in a particular case is difficult to resolve because the Court has refused "to fashion and apply a precise formula for recognition of

---

139 The Court has not clearly enunciated the precise source of the state's right to an impartial jury. Although the impartial guarantee explicit in the sixth amendment is clearly there for the defendant, Holland v. Illinois, 110 S. Ct. 803, 809 (1990), it has always been the goal of the criminal justice system to encourage impartiality for both parties and to insure that neither side is favored. *Id. See* Adams v. Texas, 448 U.S. 38, 45 (1980) ("The *[s]tate* may insist . . . that jurors will consider and decide the facts *impartially* and conscientiously apply the law as charged by the court") (emphasis added); *see also* Hayes v. Missouri, 120 U.S. 68, 70 (1887) ("It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held").

140 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 12.1, at 421 (3d ed. 1986) [hereinafter J. NOWAK]. *See supra* note 5. Even if the prosecutor can demonstrate that the defense counsel's exercise of peremptory challenges is attributable to the state, the prosecutor still has the burden of obtaining standing to assert an equal protection claim. Some have suggested that the prosecutor should be allowed third party standing to assert the rights of the excluded juror. *See* Alschuler, *The Overweight Schoolteacher from New Jersey and Other Tales: The Peremptory Challenge After Batson*, 25 CRIM. L. BULL. 57, 73 (1989); Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 366-68 (1988). Fisher, *Batson v. Kentucky: Purposeful Discrimination in Jury Selection*, 200 N.Y.L.J., Nov. 3, 1988, at 1, col. 1, 31 (citations omitted).

141 J. NOWAK, *supra* note 140, § 12.1, at 421-22.

state responsibility. . . ."[142] Rather than articulate a bright-line test, the Court has enumerated various factors and considerations to guide the resolution of state action issues. The Court will find state action: (1) if there is private action that constitutes a public function or (2) if there is an adequate identifiable relationship between the state and the challenged private action to fairly attribute the acts to the state.

A. The Public Function Theory

Under this theory, constitutional restrictions may be imposed on private parties who engage in public functions that are both "traditionally associated with sovereign governments" and "operated almost exclusively by governmental entities."[143] With respect to whether an activity is traditionally an exclusive government function, the Court has distinguished between acts that merely serve the public and acts that are truly governmental in nature.[144] Governmental functions involve political or policy decision-making, rather than the subsequent administration of policies to serve the public interest.[145] When the state endows private parties with governmental powers and functions, those parties "become agencies or instrumentalities of the State and

---

[142] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (citing Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)). The *Burton* Court further stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. *See also* J. NOWAK, *supra* note 140, § 12.4, at 438 n.1 ("Because the Supreme Court refuses to categorize its state action decisions, or even identify specific state action tests, there is necessary overlap" among the various state action inquiries).

[143] J. NOWAK, *supra* note 140, § 12.2, at 426. Although the second requirement - that the activity is conducted almost exclusively by governmental bodies - has been criticized, *see* San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 549 n.1 (1987) (Brennan, J., dissenting) and Flagg Bros. v. Brooks, 436 U.S. 149, 170-71 (1978) (Stevens, J., dissenting), it has nonetheless been reaffirmed by the Court in recent decisions as a necessary element of the public function analysis. *See San Francisco Arts*, 483 U.S. at 544; Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

[144] *San Francisco Arts*, 483 U.S. at 544 (quoting *Rendell-Baker*, 457 U.S. at 842). *But see* Evans v. Newton, 382 U.S. 296, 302 (1966) (park was subject to fourteenth amendment limitations, in part, because it "traditionally serves the community" like police or fire departments).

[145] *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 493 (1979). This definition has been illustrated in Supreme Court caselaw. *See San Francisco Arts*, 483 U.S. at 551 (Brennan, J., dissenting) (United States Olympic Committee should be deemed state actor because it is responsible for decisions in a national political arena); Terry v. Adams, 345 U.S. 461 (1953) (private party that operates "the elective process that determines who shall rule and govern in the county" is involved in governmental function).

[are] subject to . . . constitutional limitations."[146]

Unfortunately, the public function theory is an unacceptable method of establishing state action when the defense counsel exercises peremptory challenges.[147] In the first place, peremptory challenges can hardly be called governmental in nature. While the promulgation of jury selection rules and procedures is an aspect of legislative decision making, the execution of the procedures is only the administration of those policies. Hence, jury selection, and specifically peremptory challenges, are not associated with the workings of government. Nor is petit jury selection a function *exclusively* given to a governmental entity. While the state assembles the venire independently, the subsequent use of challenges to choose the final jury is carried out by both the prosecution and the defense.[148] Defendants are given challenges in an effort to avoid the emergence of a "state's jury" instead of an impartial one.[149] The adversarial relationship that exists between the two parties undermines the notion that a peremptory challenge is exclusively a government activity or that the defense counsellor who exercises one becomes an agent or instrumentality of the state.

B. Relationship Between Private Action and the State

If the facts of a particular case do not satisfy the public function theory, the Court will then look to the relationship that exists between the government and the activities of the private actor.[150] In the past, the Court has focused on whether

---

146 *Evans*, 382 U.S. at 299 (state action existed in park with private trustees, principally, because municipality controlled the management of park and park had a public purpose).

147 *But see* Note, *supra* note 140, at 360-61 (public function theory applicable to limit defense in use of peremptory challenges).

148 *See supra* note 20 and accompanying text.

149 *See* J. VAN DYKE, *supra* note 1, at 147 ("The earliest juries were effectively hand picked by the crown . . . [until] the English Parliament decided that this type of jury—which was not impartial but rather biased toward the prosecution—was obnoxious to their idea of justice") (footnote omitted). Thus, jury selection is designed to alienate the jury from the state so that it remains an independent and neutral body. *See id.*

150 *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967)) ("[W]here the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination,' in order for the discriminatory action to fall within the ambit of the constitutional prohibition"). *See also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) ("[A] multitude of relationships might appear to some to fall within the Amendment's embrace, but that . . . can be determined only in the framework of the peculiar facts or circumstances present").

(1) "there is a sufficiently close nexus between the State and the challenged action of the [private party] so that the action of the latter may be fairly treated as that of the State itself,"[151] (2) the state and the private party have acted as joint participants,[152] (3) a "symbiotic relationship" exists between the state and the private party,[153] or (4) the state has significantly encouraged or coerced the private activity.[154]

Application of this nebulous framework to the defense's use of peremptory challenges yields somewhat stronger arguments for state action than the public function theory, but nonetheless fails to link the defense counsel's discriminatory peremptory challenges to the state. Because no bright-line test exists to methodically evaluate the nature of the relationship between the government and the challenged actions of the defense, it is more useful to examine the individual arguments that can be raised in favor of classifying the defense attorney as a state actor. For example, it may be argued that because attorneys are licensed and highly regulated by the state, their actions are attributable to the state. Such state involvement may be characterized as government approval of the challenged private activity. This position, however, is refuted in a line of Supreme Court rulings which hold that state licensing or other entanglement in business is not alone sufficient to transform the private party into a state actor.[155]

A more substantial argument is that, because the state provides defense attorneys with the statutory right to exercise peremptory challenges, the state endows the defense with a badge of authority to act in a discriminatory manner.[156] Prior caselaw in-

---

151 *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

152 *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982); *Moose Lodge*, 407 U.S. at 177; Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

153 *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (citing *Burton*, 365 U.S. at 715); *Moose Lodge*, 407 U.S. at 175.

154 *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987) (citations omitted); *Blum*, 457 U.S. at 1004.

155 *See San Francisco Arts*, 483 U.S. at 543-44 (federally granted charter and congressionally authorized trademark of private corporation are not enough to constitute state action); Polk County v. Dodson, 454 U.S. 312, 319 n.9 (1981) ("[A]lthough lawyers are generally licensed by the States, 'they are not officials of government by virtue of being lawyers.' ") (quoting *In re* Griffiths, 413 U.S. 717, 729 (1973)); *Jackson*, 419 U.S. at 354 ("Doctors, optometrists, lawyers, [and] Metropolitan . . . are all in regulated businesses . . . [but] such a status [does not] convert their every action, absent more, into that of the State"); J. NOWAK, *supra* note 140, § 12.4, at 438-40.

156 *See* United States v. De Gross, 913 F.2d 1417, 1423 (9th Cir. 1990).

dicates, however, that state action exists where the state legislatures have compelled the challenged activity and not merely permitted it.[157] The state has no control over how the peremptory challenges are exercised and in no way compels discrimination in their use. In the context of peremptory challenges by the defense, the Supreme Court, therefore, should reaffirm that discrimination by private parties which the state "permits but does not compel" is not restricted by the Constitution.[158]

The most persuasive proposition is that the peremptory challenge becomes an act of the state when the judge, a state official, excuses the juror who has been discriminatorily challenged.[159] Arguably, this creates a "procedural scheme" in the jury selection process that amounts to joint activity between the judge and the private defense counsel.[160] Precedent demonstrates, however, that this argument only has merit where the state official's enforcement has compelled the allegedly illegal activity.[161] Of course, the judge's order to dismiss the challenged

---

157 *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 164-66 (1978) (state statute that permitted warehouseman to sell respondent's belongings to satisfy defaulted account did not compel the private action so as to hold the state responsible).

158 *Id.* at 164.

159 *De Gross*, 913 F.2d at 1424; People v. Kern, 75 N.Y.2d 638, 657, 554 N.E.2d 1235, 1246 (1990).

160 *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941-42 (1982) (prejudgment attachment obtained by private party from court clerk and executed by County Sheriff is state action because activity is not mere private use of state statute, but rather operation of state created procedural scheme).

161 At least two Supreme Court decisions, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) and Shelley v. Kraemer, 334 U.S. 1 (1948), have addressed situations where there was state enforcement of private activity.

In *Shelley*, the Court considered the constitutionality of private racially restrictive covenants on property. *Shelley*, 334 U.S. at 8. The Court held that the private agreements alone did not violate the fourteenth amendment, but when coupled with state judicial enforcement of the agreements, there was state action and, hence, the covenants were unconstitutional. *Id.* at 19. The Court articulated that "[t]he difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." *Id.*

The Court held in *Moose Lodge* that a private club, Moose Lodge, was not a state actor by merely having a state granted liquor license. *See Moose Lodge*, 407 U.S. at 177. Importantly, the Court also addressed a state enforcement question. *Id.* The Court noted that the state had a statute that required all liquor-licensed clubs to abide by the rules of their respective constitutions and by-laws. *Id.* at 177 (footnote omitted). The Court observed that Moose Lodge's by-laws included racially discriminatory provisions and that enforcement of the state statute *requiring* the club to comply with its own discriminatory rules would place a state sanction on the private discrimination in violation of the equal protection clause. *Id.* at 178-79.

Shelley and *Moose Lodge* clearly require that judicial enforcement compel dis-

juror is enforcement of the peremptory challenge, but the judge enforces discriminatory and non-discriminatory challenges alike. The judge's mere involvement does not constitute discrimination and does not make the state fundamentally responsible for the discriminatory activity in peremptory challenges.

Seemingly, the easiest case for classifying the act of a defense attorney as state action is where the attorney is a public defender. Even this position, however, was firmly rejected in *Polk County v. Dodson*[162] where the Court held that a public defender is not a state actor in the normal course of representing an indigent client either by nature of his employment relationship or through his other contacts with the state.[163] The Court emphasized that, because of the importance of the adversarial relationship between the defense and the state, public defenders must be allowed to act independently of the state.[164]

---

crimination in order to constitute state action under the fourteenth amendment. *See* Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury In a Criminal Trial*, 102 HARV. L. REV. 808, 817-20 (1989). While the *Lugar* decision appears to undercut the argument that defense exercised peremptory challenges are not state action, it should be noted that the *Lugar* Court specifically limited the decision to its facts, namely cases of prejudgment attachment. *Lugar*, 457 U.S. at 939 n.21.

[162] 454 U.S. 312 (1981).

[163] *Id.* at 318. While the precise issue in *Polk County* was whether the public defender acted "under color of state law" within the meaning of 42 U.S.C. § 1983, the Court has recently noted that "the state action and the under-color-of-state-law" concepts are not "so easily disentangled." *Lugar*, 457 U.S. at 928.

[164] *See id.* at 321-22. *But see* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991). In *Edmonson*, the petitioner objected to the respondent's use of peremptory challenges to remove black venire persons. *Id.* at 2081. Edmonson, a black man, requested that the defendant give a race-neutral explanation for the exclusion of the jurors. *Id.* The court of appeals affirmed the district court "holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications." *Id.*

The Supreme Court reversed holding that in civil cases discriminatory use of peremptory challenges violates the excluded jurors' equal protection rights. *Id.* The Court noted that state action must first exist before a private litigant can be charged with an equal protection violation. *Id.* at 2082. The Court, per Justice Kennedy, determined that state action exists due to a "constitutional deprivation result[ing] from the exercise of a right or privilege in state authority . . . . " *Id.* at 2082-83 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939-41 (1982)). The Court noted that the defendant would not be permitted to exclude the jurors without the use of peremptory challenges. *Id.*

In addition, Justice Kennedy posited that the defendant is a state actor because he has made significant use of the state peremptory challenge system with governmental assistance. *Id.* The Justice added that the jury trial system could not exist without the participation of the government. *Id.* Also, the majority reminded that the trial judge commands control over the entire voir dire examination. *Id.* at 4577.

CONCLUSION

Despite the extensive litigation that has developed to combat discriminatory jury selection practices, discrimination in the use of peremptory challenges continues to be a recurring problem in our criminal justice system that is not, evidently, easily eradicated. The Court has made substantial progress in addressing the problem of discrimination in jury selection, especially through the *Batson* decision which established restraints on prosecutorial peremptory challenges. Because *Batson's* narrow holding did not fully address the peremptory challenge problem, the sixth amendment impartial jury guarantee was contemplated as a possible alternative which would restrain the peremptory challenge in situations that are currently beyond the scope of *Batson* protection. The Supreme Court's rejection of the sixth amendment approach in *Holland* undoubtedly disappoints many.

The Court's ruling in *Holland*, however, was based on sound interpretations of the constitutional guarantee of an impartial jury in criminal proceedings. An impartial jury has repeatedly been found to be a jury drawn from a representative cross-section of the community. This demands no more than a venire that reflects the composition of the community at large and, thus, allows for the fair possibility that the petit jury will reflect the community. To require any more for the petit jury not only would be practically infeasible, but also would contravene the state's determination that peremptory challenges further the legitimate state goal of assuring that juries are impartial. Additionally, the sixth amendment cannot protect against the *purposeful exclusion* of jurors because the goal of the sixth amendment is to guarantee criminal defendants a jury that represents the "collective conscience of the community," not a jury selection process that is free from discrimination.

The equal protection clause is the proper constitutional provision to eliminate discrimination in the use of peremptory challenges. The Supreme Court has already chosen to expand the *Batson* decision by allowing criminal defendants to assert the rights of the excluded jurors on a third party standing basis, thus

---

Finally, the court stipulated that the peremptory challenge system is used to select a "quintessential government body, having no attributes of a private actor." *Id.*

Next, the Court briefly addressed the third party standing issue and concluded that a private civil litigant can assert the equal protection claim of the excluded juror. *Id.* at 4578-79. Specifically, the majority noted the special relationship between the parties, the barriers preventing the excluded juror from asserting his own rights and a concrete interest in challenging the exclusion. *Id.* at 4578.

abolishing the *Batson* requirement that the defendant be allowed to raise a discrimination claim only when the defendant is of the same race as the excluded juror.[165] Similar expansion of *Batson* to prevent discrimination by the defense, however, cannot be sustained by the Constitution. Attorneys who represent private defendants have no connection with the state and cannot properly be held to be state actors for purposes of a fourteenth amendment claim. While the goal of stopping private discrimination by defense attorneys is laudable and worthy of pursuit, it cannot be accomplished through misapplication of the fourteenth amendment where no state action exists.

Jean M. Shanley

---

[165] *See* Powers v. Ohio, 111 S. Ct. 1364 (1991) and *supra* note 135.